In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1681

GEORGE STEINBERG AND SON, INC., PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

After the Secretary of Agriculture had found that petitioner has engaged in flagrant and repeated violations of the Perishable Agricultural Commodities Act (46 Stat. 531, as amended, 7 U.S.C. 499a, *et seq.* ("the Act")), and denied petitioner a license under the Act, petitioner filed with the court of appeals a petition to review pursuant to 28 U.S.C. 2342, *et seq.* The court of appeals denied review (Pet. App. A3-A14) and denied rehearing (Pet. App. A1-A2), but granted a 30-day stay pending application for a writ of certiorari. The court of appeals denied a second stay application and Mr. Justice Marshall and Mr. Justice Douglas have each denied petitioner's applications for a further stay.

1. Petitioner was[1] a corporation licensed under Section 3 of the Act (7 U.S.C. 499c). Petitioner's sole officers were George Steinberg, president, and his son Paul Steinberg, secretary (C.A. App. A-315.)[2] Between April 1968 and May 1969, petitioner purchased, received and failed to pay for 328 lots of perishable agricultural commodities having a total value of $67,641.96 (C.A. App. A-287). In November 1968, complete control of petitioner was vested in Paul Steinberg (C.A. App. A-158, A-175). Petitioner was adjudicated bankrupt in June 1969, and that same month its license terminated because the company failed to renew it.

In July 1970, the Department of Agriculture filed an administrative complaint charging petitioner with repeated and flagrant violations of the Act by reason of its failure to pay more than $67,000 owed for prior shipments. 7 U.S.C 499b(4) provides that it shall be unlawful for a commission merchant, dealer or broker to fail to make full payment promptly. Petitioner filed an answer "not deny[ing] the failure to make full payment on perishable agricultural commodities received and accepted in interstate commerce" (C.A. App. A-267).[3]

At an administrative hearing, the Department of Agriculture produced witnesses affiliated with three of the unpaid creditors, who confirmed that their

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[1]Petitioner was dissolved subsequent to the actions here in question (Pet. 4).

[2]"C.A. App." refers to the appendix filed in the court of appeals.

[3]The Secretary vacated an earlier default judgment of which petitioner alleged it had not received notice.

companies had not received payment on more than 30 shipments (C.A. App. A-61, A-76, A-97). In addition, one witness testified that in 1968 a check to the creditor signed by Paul Steinberg was returned without payment due to insufficient funds (C.A. App. A-106, A-109). The parties then stipulated that on 328 separate occasions petitioner had failed to pay for commodities received.[4]

The hearing examiner filed a recommended decision suggesting that the complaint be dismissed on the ground that 5 U.S.C. 558(c) required that, absent willfulness, petitioner be given an opportunity to demonstrate or achieve compliance (*i.e.,* be given a "second chance") before the complaint was filed.

While the case was pending on review before the judicial officer, he issued an order requesting petitioner to file an offer of proof concerning, *inter alia,* petitioner's lack of willfulness. The judicial officer specified that he wanted this information to determine whether the case should be remanded for additional evidence. In its response, petitioner stated that, if the case were remanded, it would offer evidence to show that George Steinberg suffered from a chronic cardiac condition, and that, had willfulness been in issue, petitioner would not have stipulated to the alleged violations but would have attempted to demonstrate, through examination of witnesses, "the

[4]The Department subsequently decided not to pursue violations that occurred after the adjudication in bankruptcy. Accordingly, the stipulation remained in effect for 283 violations.

incapacity and unintentional mismanagement by the operating officer George Steinberg" (C.A. App. A-53 to A-57).[5]

The judicial officer denied the remand and held that petitioner had committed flagrant and repeated violations of the Act. Such a finding bars Paul Steinberg, as a person responsibly connected with petitioner, from employment by a licensee under the Act for one year, and thereafter without the approval of the Secretary. 7 U.S.C. 499h(b)(2). The judicial officer also rejected each of petitioner's defenses, including the contentions that the Act is unconstitutional, that the complaint was not signed by the proper official, and that the violations were not willful. On this last issue, the judicial officer concluded that the violations were willful, but noted that willfulness was not a relevant issue since 5 U.S.C. 558(c) applies only if a license is suspended or revoked. The judicial officer ordered publication of the facts and circumstances of the flagrant and repeated violations and of the denial of petitioner's application for a license. The judicial officer denied petitioner's motion for rehearing, reargument and reconsideration. In a comprehensive opinion upon which we mainly rely, the court of appeals denied a petition for a review (Pet. App. A3-A14).

2. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals, is correct, and presents no issue warranting further review.

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[5]At oral argument before the judicial officer, petitioner was unable to present evidence of willfulness affecting more than a few of the 283 transactions involved (C.A. App. A-245n to A245o) and, in response to the judicial officer's written inquiry after argument, petitioner presented no further pertinent evidence.

A. The court of appeals (Pet. App. A9-A10) rejected petitioner's contention that the disciplinary complaint had improperly been issued by the Director of the Fruit and Vegetable Division, whereas the regulation authorized only the "Deputy Administrator" to institute such proceedings (7 C.F.R. 47.27(b)), because the regulations also defined "Deputy Administrator" to include a person, like the Director, to whom the relevant authority had been delegated. 7 C.F.R. 47.2(e); 33 Fed. Reg. 10754.

B. The court of appeals (Pet. App. A10-A11) rejected petitioner's reliance upon the "second chance" principle reflected in 5 U.S.C. 558(c), on the ground that the Secretary's actions here did not constitute "the withdrawal, suspension, revocation, or annulment of a license," to which Section 558(c) is by its terms limited. Petitioner's license had lapsed and it was seeking a new license, while Paul Steinberg was not himself a licensee. The court also noted that Section 558(c) was inapplicable where, as here, the violations were found to have been "willful" (Pet. App. A11).

C. The court of appeals (Pet. App. A12-A13) rejected petitioner's claim that it was entitled to a further hearing on the question of willfulness, on the grounds (a) that willfulness was irrelevant because 5 U.S.C. 558(c) was applicable in any event, and (b) that petitioner in fact had the opportunity to present evidence as to willfulness and had given no indication that it had anything to submit as to the great bulk of the violations.

D. Finally, the court of appeals (Pet. App. A12) rejected petitioner's claims as to the unconstitutionality of 7 U.S.C. 499h(b), which restricts the employment by licensees under the Act of "any person who is or has been responsibly connected with any person * * * " found to have committed flagrant or repeated violations. The court held that petitioner's contentions (Pet. 3, 15-16) that Section 499h(b) deprived Paul Steinberg of his right to work, without due process, and constituted an excessive fine, cruel and unusual punishment, and a bill of attainder, had been completely answered in its prior decision in *Zwick* v. *Freeman,* 373 F. 2d 110, 118-120 (C.A. 2), certiorari denied, 389 U.S. 835. See also *Birkenfield* v. *United States,* 369 F. 2d 491, 494-495 (C.A. 3).[6] In *Zwick* the court held that the Constitution does not guarantee an unrestricted privilege to engage in business or to conduct a business as one pleases. Moreover, the court held that the perishable agricultural commodities industry is subject to reasonable congressional regulation, and that the employment restriction in §499h(b) is a permissible remedial measure. The court held that this sanction is not penal and does not constitute a bill of attainder.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[6]Although the question does not appear to have been raised below, it is doubtful whether petitioner has standing to challenge consequences of its violation that attach to other persons. Paul Steinberg, who is the person affected by the application of Section 499h(b) of which petitioner complains, has not been a party to the proceedings.